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No. 72-1699

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In the Supreme Court of the United States

OCTOBER TERM, 1973

ROGER MUSCOLINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that his conviction for failure to keep his Selective Service Board informed of his correct status was invalid for insufficient proof of criminal intent, because no violation of law was charged, and because of a variance between the proof and the indictment.

Petitioner was convicted, after a jury waived trial in the Northern District of Illinois, for failure to notify his local Selective Service Board of a fact which might change his status, in violation of 50 U.S.C. App. 462. He was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. A).

The evidence showed that in September or November 1967, petitioner, whose draft classification at that time was 1-A, applied for membership in the Illinois National

Guard (Tr. 39-40, 56, 64-67; Gov. Ex. A-1).[1] Petitioner was never inducted into the Guard. However, on December 4, 1967, petitioner's local draft Board in Chicago received from the Illinois National Guard a DD Form 44 ("Record of Military Status of Registrant") (Gov. Ex. A-42) dated November 29, 1967, which erroneously stated that petitioner had entered the Guard. Relying upon this incorrect information, the local Board reclassified petitioner 1-D ("qualified member of the Reserve component or student taking military training, including ROTC, and accepted aviation cadet") and on December 19 mailed him a notice of his reclassification, which he received a few days later (Tr. 5-6).

Petitioner alleged that he telephoned the National Guard both before and after the receipt of his notice of reclassification "to find out what was going on because I filled out the application" (Tr. 81. See Tr. 42, 45, 80, 90). He further alleged that the only answer he received to these repeated inquiries was that "you will be hearing from us" (Tr. 42, 80, 90).[2]

On August 8, 1968, petitioner was interviewed by agents of the F.B.I. He told them that he was a member of the Illinois National Guard; he conceded that the Guard had never contacted him after he applied to join,

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[1]Tr. refers to the trial transcript, a copy of which is being lodged with the Clerk of this Court. Petitioner's Selective Service file (Gov. Exs. A-1—A-51) was received in evidence (Tr. 7); we are also lodging copies of this file and the other government exhibits.

[2]Petitioner also testified that on January 16, 1968, he told a clerk at the Selective Service Board, who inquired about his 1-D classification when he was reporting a change of address, that he had not been sworn in, and that she made no comment (Tr. 43-44, 91-93). His Selective Service file contains no record of such a discussion (Tr. 94, Gov. Ex. A-41).

but mentioned his re-classification by the local Board as evidence that the Guard had indeed accepted him (Tr. 45-46, 111; Gov. Ex. B).

Petitioner did not consult his local Board about his draft status until September 1, 1969; he then informed them of the birth of his son in August 1969, and noted that he had been classified 1-D in December 1967 "which I then thought I was on a waiting list to be inducted into the National Guard. In December 1968 I then was picked up by the F.B.I. At this time they confiscated my draft classification card." (Gov. Ex. A-27). He concluded by asking for his present draft classification. The Board replied on September 8, 1969, that his classification was 1-D (Gov. Ex. A-38), but on subsequent inquiry of the National Guard, discovered petitioner had never been a member (Gov. Ex. A-36). Petitioner was accordingly reclassified 1-A on December 9, 1969, and declared delinquent (Gov. Ex. A, p. 2; A-11). When notified of this action, petitioner denied any delinquency, asserting that he had told the F.B.I. in August and December of 1968 that he was not in the National Guard, but only on a waiting list to get in (Gov. Ex. A-21—A-22).

The district court concluded, on this evidence, that petitioner might have believed that he had been accepted by the National Guard when he received his 1-D classification from his local Board, and for some time thereafter. However, the court held, this belief was no longer tenable after his interview with the F.B.I. in August, 1968. Accordingly, since the duty to report was a continuing one, the court found that proof of a failure to report a change of status at any time between the date alleged in the indictment and the date of the indictment supported the conviction (Pet. App. 10a-11a). The

court of appeals affirmed, finding that petitioner was sufficiently advised concerning the prosecution's reliance on the August date, and thus had shown no prejudice (Pet. App. 7a-8a).

1. Petitioner primarily contends that there was insufficient evidence of his criminal intent, since, he alleges, he believed that he was a member of the National Guard (Pet. 17). The issue is whether the government proved its case beyond a reasonable doubt on the basis of the fact the August 1968 F.B.I. interview should have raised in petitioner's mind sufficient doubt about his status with the National Guard to require him to take some affirmative action with his local Board.

The trier of fact specifically found that the evidence indicated that, although petitioner might initially have believed that his classification was justified, after the Guard had failed to notify him of any action on his application for many months, and the F.B.I. had interviewed him in connection with that application, any belief "that he might continue legally to enjoy [his 1-D status] without contact with the board is a belief on the part of the defendant that is no longer tenable" (Pet. App. 10a). This is a reasonable analysis of the evidence summarized above. Since the card petitioner received from his Board indicated that the 1-D status was for a "qualified member of the Reserve component" and that he was required to notify his Board of "any other fact which might change your classification" (Gov. Ex. C-1), the government showed the necessary criminal intent: that the petitioner knew his legal obligation and deliberately failed to comply with it. *United States* v. *Boardman*, 419 F. 2d 110 (C.A. 1); *United States* v. *Rabb*, 394 F. 2d 230, 233 (C.A. 3).

2. Petitioner also asserts that the indictment does not charge an offense against the law of the United States, since, he alleges, those laws require him to report only *changes* in his status, and, since he was never a member of the Guard, his status did not change. But 50 U.S.C. App. 462(a) provides for punishment of "any person * * * who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under * * * rules, regulations, or directions made pursuant to this title * * *." One such regulation is 32 C.F.R. (1967 ed.) 1641.7(a), which requires the registrant to keep the Board currently informed of his military status.[3] It is clear that, under this regulation, which was summarized on petitioner's draft card, he was obliged to inform the local Board when he became aware of the fact that he was not a member of the Guard, since at the point it was clear that the Board was not informed of his correct military status.

3. Finally, petitioner urges that there was a fatal variance between the evidence and the indictment, since the indictment charged that "on or about January 2, 1968" the petitioner willfully failed to notify his Board that he was not a member of the National Guard (Pet. App. 7a), while the trial court found that the proof showed instead that the offense charged occurred in

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[3] 32 C.F.R. (1967 ed.) 1641.7(a) provides:

> "It shall be the duty of every classified registrant to keep his local board currently informed of his occupational, marital, family, dependency, and military status, of his physical condition, of his home address, and of his receipt of any professional degree in a medical, dental, or allied specialist category. Every classified registrant shall, within 10 days after it occurs, report to his local board in writing every change in such status and in his physical condition and home address and his receipt of any such professional degree.

August (Pet. App. 10a). The court of appeals noted that both the government's trial brief and its response to petitioner's bill of particulars notified him of the government's contentions as presented at trial, so that petitioner was not prejudiced in preparing his defense (Pet. App. 7a-8a). Petitioner does not here contest this conclusion. Under these circumstances, since it is clear that petitioner was under a continuing obligation to report his correct status to the Board when he became aware of it (32 C.F.R. (1967 ed.) 1632.2), the variance was not fatal.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[4]In *United States* v. *Fagurell*, 462 F. 2d 1080, 1082-1083, n. 5 (C.A. 3) the court concluded that a different reulation (32 C.F.R. (1967 ed.) 1625.1(b)), did not impose a continuing duty upon a registrant to keep the board informed of his status, and that the registrant could not be convicted of a breach of duty occurring more than a week or two after the date specified in the indictment. There was, in *Figurell*, no indication that the variance had not prejudiced defendant.